(3)

No. 90-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CONNECTICUT OFFICE OF CONSUMER COUNSEL, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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AT&T's OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission acted arbitrarily and capriciously in concluding that AT&T did not engage in unreasonable discrimination in violation of 47 U.S.C. § 202(a) by adopting a tariff that recovers the costs imposed by state gross receipts taxes from the ratepayers in the states imposing the tax, and that thereby equalizes the burdens under similar taxes and eliminates the incentive of states to adopt taxes that artificially increase rates for interstate telecommunications service.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in ACE Limited; Paradigm Technology, Inc.; Sundisk Corporation; Resound Corporation; Intermetrics Inc.; Telehouse America, Inc.; Communications Software Development, Inc. (Mitek Systems, Inc.); Compagnie Industriali Riunite S.p.A. (CIR); Sun MicroSystems, Inc.; Societa' Italiana Telecommunicazioni S.p.A. (Italtel); Canadian Distance Learning Development Centre Ltd.; Truevision, Inc.; Atesia S.p.A.; Jamaica Digiport International, Ltd.; Omnicad; Novo Quality Services Pte. Ltd. (Singapore); Western Electric Saudi Arabia, Ltd. (WESA); GoldStar Information and Communications Co. Ltd.; Airways Facilities Engineering Co.; AG Communications Systems Corporation; APT Italia S.A.; CA Charlotte Associates; Grassmere Park Associates; 155334 Canada Inc. (Canada); Tower Center Associates; ABC Travelbank Limited; AT&T Credit FSC, Inc.; AT&T Fleet Services; AT&T JENS Corporation (Japan); AT&T of Shanghai, Ltd.; Call Interactive; Cuban American Telephone and Telegraph Co. (Cuba); Facilities Management Services Limited; GoldStar Fiber Optics Co., Ltd. (Korea); PITS Holding BV; Rosewood Associates; AT&T ISTEL Purchasing Systems Limited; AT&T Network Systems Espana SA; AT&T Ricoh Company Ltd. (Japan); InView Limited; LITESPEC Inc.; LYCOM A/S (Denmark); Claimview Limited; ISTEL Holdings Limited; AT&T Taiwan Telecommunications Co., Ltd.; Failsafe ROC Limited; AT&T Network Systems International BV (Netherlands); Agricultural Commodities Services Limited; InView Holdings Limited; VIEWTEL Holdings Limited; AT&T Automotive Services, Inc.; AT&T Europe s.a./n.v. (Belgium); AT&T (UK) Ltd.; AT&T Telecommunicacoes Ltda. (Brazil); AT&T France S.A.; Eastern Telephone and Telegraph Company (Canada); and AT&T Hong Kong Limited.

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REASONS FOR DENYING THE WRIT

In this case, petitioners have challenged a provision in AT&T's interstate long-distance tariffs that recovers the costs of state gross receipts taxes from the customers in the particular state that imposes each tax. This provision ensures equal treatment of charges under similar taxes, and it eliminates the incentive states would otherwise have to export their tax burden to citizens in other states and thereby artificially inflate the cost of long-distance serv-

ice. On this basis, the Federal Communications Commission ("FCC") held that any rate differences that result from this surcharge do not constitute unreasonable discrimination in violation of Section 202(a) of the Communications Act, and the United States Court of Appeals for the Second Circuit upheld this decision.

There is no basis for this Court to review the decision of the Court of Appeals. That decision does not conflict with any decision of this Court or any other Court of Appeals. Rather, the Second Circuit's decision is simply an application of settled interpretations of Section 202(a) of the Communications Act to a set of unique facts. Indeed, petitioners' contention is that the judgment below "is not supported on the record and is contrary to significant ratepayer and consumer interests." Pet. 21. This claim would be inappropriate for Supreme Court review even if it had any substance. However, as explained below, the record abundantly supports the decisions of the FCC and the Court of Appeals.

1. AT&T's gross receipts tax surcharge ("GRTS") is a response to state laws that were enacted in the wake of fundamental changes in federal constitutional law in the mid-1970s. Prior to that time, the Constitution had been interpreted to prohibit state gross receipts taxes on interstate telecommunications services,[1] and few states have ever imposed such taxes. Instead, they have subjected interstate telecommunications carriers to income taxes, property taxes, and other like taxes that apply generally to businesses and individuals throughout the state. Because of their general applicability, the burden of these taxes falls almost entirely on the citizens in the state imposing them.

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[1] *Compare New Jersey Bell Tel. Co.* v. *State Bd. of Taxes*, 280 U.S. 338 (1930); *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935); *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 432-34 (1947) *with Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), *and Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

Several states have responded to the intervening change in federal constitutional law by imposing sales or excise taxes on the charges for interstate telecommunications services. These states have structured their taxes so that the tax is recovered directly from ratepayers within their jurisdictions through a separate charge on their citizens' interstate telephone bills. Thus, the economic burden of paying these taxes rests with their citizens alone. *See Goldberg* v. *Sweet*, 488 U.S. 252 (1989) (upholding Illinois Telecommunications Excise Tax on this ground).

However, as of March, 1986, nine states (including Connecticut) were imposing gross receipts taxes on interstate telecommunications carriers with no provision for recovery of this tax from their own citizens. Because AT&T did not then "flow through" these expenses to ratepayers in the states that imposed them, the expenses that resulted from these taxes were recovered by increasing AT&T's averaged nationwide rates. The net result was that the state that imposed the tax received the benefit of the tax, but its burden was almost entirely exported to customers in other states. This created a perverse incentive for states to target interstate telecommunications carriers for special tax burdens and thereby artificially raise the costs of interstate telecommunications services.

These perverse incentives are vividly illustrated by the legislative history of Connecticut's gross receipts tax. As the FCC and the Court of Appeals observed (Pet. App. 11a, 52a-53a), when Connecticut considered reforming its taxes in 1986, it decided to retain its gross receipts tax precisely because the tax burden would be exported to other states.[2]

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[2] Connecticut candidly stated that, whereas an excise tax and a gross receipts tax would produce the same revenues, they would have vastly different consequences for Connecticut residents: an excise tax would increase each Connecticut resident's phone bill by the amount of the tax, while a gross receipts tax, even one with a "high telecommunications tax rate," would have only a "minimal

2. In 1986, AT&T filed a tariff containing the GRTS to eliminate this incentive and produce equality of treatment between states with excise or sales taxes and states with gross receipts taxes. Under the GRTS, AT&T recovers the state taxes on interstate gross receipts directly from the customers in the few states that impose the tax.

The GRTS has had its intended effect. By November of 1989, when the FCC issued its decision upholding the GRTS, five states had repealed or reduced their gross receipts taxes, thus reducing the costs of, and rates for, interstate telecommunications service. Pet. App. 53a.

3. Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), does not prohibit all rate differences between like services. It prohibits only "unreasonable discrimination." Furthermore, contrary to petitioners' apparent assumption that only differences in cost can justify differences in rates, courts have consistently held that rate disparities are justified as long as they have a "neutral, rational basis" which promotes the objectives of the Communications Act.[3] The FCC and the Court of Appeals applied this standard in upholding the GRTS.

The FCC concluded that AT&T's surcharge was a reasonable mechanism for allocating specific costs "directly to the originator of those costs," and eliminating the "incentive to target telecommunications carriers for special tax burdens and thereby export the cost of the tax to customers in other states . . . ." Pet. App. 37a-38a. The Court of Appeals upheld this reasoning as "unassail-

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impact" on Connecticut residents because its cost would be borne largely by out-of-state customers, and be a "hidden tax." Finance, Revenue & Bonding Comm., Connecticut General Assembly, *Final Report of the Connecticut Telecommunications Task Force*, 95, 99-100, 116 n.5 (1986).

[3] *See, e.g., AT&T* v. *FCC*, 832 F.2d 1285, 1293 (D.C. Cir. 1987); *Reservation Tel. Coop.* v. *FCC*, 826 F.2d 1129, 1136 (D.C. Cir. 1987); *National Assoc. of Reg. Util. Comm'rs* v. *FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

able," *id.* at 11a, and observed that, in the absence of the GRTS, the inevitable result would be an "upward-spiraling" of long-distance rates "bearing no relation to actual costs of service." *Id.* The Court of Appeals concluded that preventing that prospect was "well within" the Commission's statutory mandate to assure reasonable charges for interstate telecommunications service. *Id.*

In so holding, the FCC and the Second Circuit simply followed the uniform decisions of state courts and state regulatory commissions that adopted this precise rationale and held that "flow throughs" of municipal taxes to that municipality's ratepayers do not violate the analogous nondiscrimination provisions contained in state regulatory statutes.[4]

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[4] *See, e.g., Allocation of Local Utility Gross Receipts Taxes Among Consumers,* Opinion No. 81-22, Case No. 27611 (Oct. 29, 1981 N.Y. Pub. Serv. Comm'n); *City of Des Moines* v. *Iowa State Commerce Comm'n,* 285 N.W.2d 12, 16 (Iowa 1979); *Peoples Gas Sys.* v. *Lynch,* 254 So.2d 371, 373 (Fla. Dist. Ct. App. 1971), *cert. denied,* 267 So.2d 81 (1972); *Village of Maywood* v. *Illinois Commerce Comm'n,* 23 Ill.2d 447, 178 N.E.2d 345 (1961), *cert. denied,* 369 U.S. 851 (1962); *City of Scottsbluff* v. *United Tel. Co.,* 171 Neb. 229, 240-245, 106 N.W.2d 12, 19-22 (1960); *State ex rel. City of West Plains* v. *Public Serv. Comm'n,* 310 S.W.2d 925, 929-33 (Mo. 1958); *Ogden City* v. *Public Serv. Comm'n,* 123 Utah 437, 443, 260 P.2d 751, 754 (1953); *State ex rel. Pacific Tel. & Tel. Co.* v. *Department of Pub. Serv.,* 19 Wash.2d 200, 273-78, 142 P.2d 498, 533-38 (1943), *aff'g as modified,* 37 P.U.R. (N.S.) 321, 404-05 (Wash. Dep't of Pub. Serv. 1940); *City of Elmhurst* v. *Western United Gas & Elec. Co.,* 363 Ill. 144, 146-48, 1 N.E.2d 489, 490-91 (1936); *In re Chesapeake & Potomac Tel. Co.,* 12 P.U.R.3d 517, 519-25 (Va. State Corp. Comm'n 1956) (collecting cases); *In re Western Light & Tel. Co.,* 10 P.U.R.3d 70, 79-80 (Mo. Pub. Serv. Comm'n 1955); *In re Southern Bell Tel. & Tel. Co.,* 7 P.U.R. (N.S.) 21, 33 (N.C. Utils. Comm'n 1934).

Petitioners are simply wrong in claiming that the Colorado Supreme Court struck down an "analogous" surcharge in *City of Montrose* v. *Public Utilities Commission,* 590 P.2d 502 (Colo. 1979), and three subsequent decisions of that court. Pet. 26-30. The surcharge at issue in each case applied to the franchise fees which had been imposed by some municipalities in Colorado upon gas utilities as a *substitute* "for the actual cost to [the utility] of carrying on its

4. Petitioners do not challenge the lower court's interpretation of Section 202(a). Instead, their principal contention is that the decision of the Court of Appeals "is not supported on the record and is contrary to significant ratepayer and consumer interests." Pet. 21.

This is plainly wrong. The history of Connecticut's own gross receipts tax shows the incentive states would have, in the absence of the GRTS, to adopt what Connecticut itself called a "hidden tax" in order to export their tax burdens to citizens in other states. *See supra* pp. 3-4 & n.2; Pet. App. 11a, 52a-53a. Further, the record also demonstrates that states have responded to the GRTS by repealing or reducing their gross receipts taxes, and thus reducing the costs of interstate long-distance service and promoting the objectives of the Communications Act. Indeed, because these are the same findings that state tribunals have made for decades (*see supra* p. 5 n.4), they plainly are reasonable.

5. Petitioners also contend that the failure of the FCC to hear oral testimony "constitutes an abuse of discretion under the circumstances of the instant case." Pet. 37. This contention is frivolous. Petitioners had a full hearing. They made lengthy written submissions of testimony and argument, and were permitted extensive discovery against AT&T. Because there were no credibility

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business" within the municipality. *City of Montrose* v. *Public Utils. Comm'n*, 590 P.2d at 505. The court in each case held that because these fees were merely a substitute for such costs (i.e., condemnation and repair costs that would otherwise have been imposed), they should be "similarly expensed" as an averaged cost rather than surcharged. *Id.* Connecticut's gross receipts tax, in contrast, is not a substitute for any other cost of doing business. Moreover, the regulatory order establishing the franchise-fee surcharge had been adopted "solely as a matter of administrative convenience," *id.* at 506, and not, as with the FCC order, in order to eliminate incentives which would artificially increase the cost of service. The Colorado Supreme Court was not faced with, and thus did not address, the validity of the reasoning that formed the basis of the FCC decision approving the GRTS.

determinations to be made, and because the petitioners' testimony on other costs associated with providing long-distance service in Connecticut was legally irrelevant, the FCC's refusal to receive oral testimony plainly did not constitute an abuse of its broad discretion to resolve complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208(a) (1988).

6. Finally, this case has no continuing practical significance because Connecticut repealed its gross receipts tax effective January 1, 1990. Pet. App. 53a. This constitutes an independent ground to deny the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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